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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 429

BRIAN O. SPARKS, BRANT PHILLIPS, JOHN SCOTT, ROY MOORE, WENDELL L. DANIELSON, FRANK T. HOTOPH, JOHN J. TAYLOR,

Petitioners,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

PAN AMERICAN AIRWAYS, AMERICAN OVERSEAS AIRLINES, AMERICAN AIRLINES,

Interveners

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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CIVIL AERONAUTICS BOARD,

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PAN AMERICAN AIRWAYS, AMERICAN OVERSEAS AIRLINES, AMERICAN AIRLINES,

Interveners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled cause on August 10, 1950. Rehearing was denied on September 6, 1950.

Opinions Below

The opinion of the Circuit Court of Appeals is reported in 184 F. (2d) 66 (1950). A *per curiam* denial of rehearing is unreported.

Jurisdiction

The jurisdiction of this Court is involved under Section 1006 (f) of the Civil Aeronautics Act, 49 U.S.C. 646 (f) and 28 U.S.C. Section 1254 (1).

Questions Presented

The questions presented are the following:

1. Whether Section 801 of the Civil Aeronautics Act, 49 U.S.C. 601, requiring the President to approve certain actions of the Civil Aeronautics Board relating to international, overseas, and territorial air transportation, required or authorized the President to reverse a finding and decision of that Board denying in the public interest the transfer of the certificate of one American-flag international carrier to another.

2. Whether such Presidential review also extends to the acquisition of the assets of one such carrier by another.

3. Whether the President, if he possesses the right to review the denial of a transfer of a certificate, is authorized to make the transfer conditional upon the award of new routes, the award of which was expressly excluded from consideration by the Board in the proceeding relating to the transfer.

4. Whether a Board order that was never adopted at a meeting of the Board but only initialled severally by the members of the Board is a valid adoption of an order by the Board.

Statutes Involved

The pertinent statutory provisions of the Civil Aeronautics Act are the following:

Section 801, (49 U.S.C. 601)

"The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof. . . ."

Section 401 (i). (49 U.S.C. 481 (i))

"No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest."

Section 408 (b). (49 U. S. C. 488 (b))

"Any person seeking approval of a consolidation, merger, purchase, lease, operating contract or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the

public interest or that the conditions of this section will not be fulfilled, it shall by order, approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided,* That the Board shall not approve any consolidation, merger, purchase, lease, operating contract, or acquisition of control which would result in creating a monopoly or monopolies and thereby restrain competition or jeopardize another air carrier not a party to the consolidation, merger, purchase, lease, operating contract, or acquisition of control. . . ."

Statement of the Case

At the opening of this proceeding three American-flag airlines were authorized to engage in scheduled service from United States points over the North Atlantic to Europe. American Overseas Airlines (hereinafter called AOA), a subsidiary of American Airlines, was authorized to serve the northern portion of the European continent through the gateways of Shannon and London. Its greatest traffic points were London and Frankfurt. Pan American World Airways (hereinafter called PAA), operating also from the United States through Shannon and London, had a route from there via certain central European points (including Frankfurt) to Istanbul and thence to India and the Far East where it linked up with its trans-Pacific service. It also had a route from the United States via Lisbon to Marseilles. Trans-World Airways (hereinafter called TWA) was authorized to fly from United States points through Shannon to Paris, Rome and other intermediate points to Cairo and thence to India. It also had a route via Lisbon and Madrid to Cairo either through Rome or through North African points.

The certificates of all these carriers with the exception of PAA's routes to London and Marseilles, had been granted by the Civil Aeronautics Board in 1945 in an overall proceeding entitled the *North Atlantic Route Case*, 6 CAB 319, and were "temporary" in the sense that they expired, subject to the possibility of renewal, in 1952, the theory of the Board being that seven years' experience would enable it to make such necessary adjustments in routes and number of carriers that experience might demand. As against the contention that only one American-flag carrier should be certificated across the North Atlantic, the Board certificated these three carriers upon the theory that it would provide a type of "balanced competition" between American-flag carriers. Such competition, in its opinion, would advance American aviation as contrasted with giving all this traffic to one American air carrier. In the route pattern so certificated, the chief points for traffic were London, Frankfurt, Paris and Rome. The two former were served both by AOA and PAA, whereas the latter two were served only by TWA. Shannon was a common gateway for all three carriers.

Subsequent to the above decision, PAA applied for authority to serve Paris and Rome. This application had been rejected twice with regard to Paris and once with regard to Rome. *First* and *Second North Atlantic Route Amendment Cases*, 7 C. A. B. 133, 455 (1946). A further application for service to these points by PAA was, however, pending at the time of the events in question (C. A. B. Docket No. 2986).

On December 13, 1948, PAA and AOA concluded an agreement for the purchase by PAA of AOA's certificate and assets. The purchase price was to be the book value of AOA's assets payable in PAA stock at the latter's book value. The agreement had a termination date of September

13, 1949. Applications for the approval of the transfer of AOA's certificate and the acquisition of its assets were filed with the Civil Aeronautics Board pursuant to Section 401 (i) and Section 408 of the Civil Aeronautics Act. 49 U. S. C. 481 (i), 488 (b). A number of parties intervened in this proceeding including TWA and the petitioners.

The petitioners are each residents of New York State and employees of AOA. They are acting pursuant to authorization as representatives of over 200 employees of AOA in substantially every category of employment. Some of these 200 employees are also stockholders of AOA. (R. 20)* Their petition to intervene, although exhibiting an interest and concern with such employee protective conditions as might be required in the public interest if the acquisition was approved, was based primarily upon the ground that the transfer of AOA's certificate to PAA was not in the public interest and should be disapproved pursuant to Section 401 (i) of the Act. (RB. 7036-7058). Intervention was permitted by order of the Civil Aeronautics Board. (RB. 7420.)

Following a pre-hearing conference, the Board issued an order (Ser. No. E-2512) instituting a proceeding to determine whether, if the proposed transfer of Overseas to Pan American was approved, the public convenience and necessity would require any alterations or amendments to the certificates of AOA, PAA and TWA. (R. 155-158) This proceeding was consolidated with the pending proceeding relating to the approval of the transfer and acquisition, and

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* By stipulation between the parties only portions of the enormous record of 11,000 pages have been printed, although they have agreed that reference can be made to any portion of it (R. 166-8). For convenience sake the following abbreviations are utilized in referring to this record: P for petitioners' Petition for Judicial Review; PR for petitioners' Petition for Rehearing; A for Affidavits of H. J. Friendly *et al.;* R for the portion of the record printed pursuant to stipulation; RB for the unprinted record before the Board.

the consolidated proceeding was designated as the *North Atlantic Route Transfer Case.* An order clarifying the scope of the entire proceeding was subsequently issued, stating inter alia that a general revision of the North Atlantic route pattern was not under consideration by the Board; that the Board did not intend to determine in this proceeding "whether new services were required in the area covered by the certificates of the transatlantic carriers" and "did not intend to pass upon the question whether new or different services were needed in the area" and was "not presently concerned with that question." (R. 158-165)

Subsequent to this enlargement of the *North Atlantic Route Transfer Case,* Seaboard and Western Airlines, an irregular air carrier and a party to that proceeding, but also an applicant in a separate proceeding for a certificate to carry property only on routes across the Atlantic, moved the Board to consolidate this latter proceeding into the *Transfer Case.* (RB. 7089-7101) This motion was denied by the Board and Seaboard appealed that order to the United States Court of Appeals for the District of Columbia. It was Seaboard's position that the *Transfer Case* would involve a reconsideration of the whole North Atlantic route pattern and that therefore a decision in the *Transfer Case* might prejudice the disposition of Seaboard's application for a certificate to serve that area.

Relying upon the Board's assertions that "it (the Board) does not propose to reconsider, in the Transfer Case, the North Atlantic route pattern," and that "at the utmost it will merely make, as a condition of the approval of the merger, such adjustments between the two remaining carriers as are necessary to maintain a proper competitive balance between them," the Court dismissed Seaboard's appeal. *Seaboard and Western Airlines, Inc.* v. *Civil Aeronautics Board,* 181 F. (2d) 777, 780 (1949).

The Court was careful to point out in its opinion that:

> "If that proceeding should go beyond, or tend to go beyond, the issues as limited by the Board's declarations, Seaboard will have opportunity to protect whatever rights it has in respect of its application. As we have said, it has no initial right to have the area case re-opened; its right is to have its application considered in any proceeding in which general consideration of the area is re-opened." *Id.* at p. 780.

Extensive hearings in which petitioners actively participated were held before an examiner. The hearings ran for many weeks, thousands of pages of testimony were taken and hundreds of exhibits introduced. The acquisition and transfer were challenged by petitioners and the other intervenors on many grounds relevant to the central issue of the public interest involved, among which were the fairness of the agreement, the unlikelihood that it would reduce the subsidy provided by way of airmail pay for the North Atlantic operation, the likelihood that the imbalance created by the merger of AOA and PAA would tend toward a monopoly of air transportation particularly in the light of the far-flung international air transportation system of PAA, and that, in the light of certain monopolistic tactics and restraints of trade pursued by PAA in the past, its expansion and assumption of increased responsibilities was not in the public interest.

Subsequent to this hearing and shortly prior to the termination date of the acquisition agreement, the agreement between PAA and AOA was renegotiated and PAA agreed to pay AOA approximately $17,500,000 in cash for its certificate and assets. A supplementary hearing was held on this second agreement. (RB. 3874)

On December 22, 1949, the Examiner issued his report recommending the approval by the Board of the acquisition.

(RB. 8795-8975) Exceptions to this report and briefs thereon were filed, and oral argument, extending several days, was held before the Civil Aeronautics Board.

On May 17, 1950, the Board adopted an opinion and order disapproving the transfer and acquisition. (RB. 10585-10749) The contents of the several opinions of the Board members may be summarized as follows. The Chairman and Member Adams concluded that the proposed acquisition would result in an increase in mail pay with a consequent increase in costs to the public; that as a result of the acquisition and transfer Pan American would enjoy such a predominant position in the North Atlantic trade as to threaten effective competition in American-flag air operations, and that a rearrangement of routes between the remaining American-flag carriers in the limited manner in which this could be done in the pending proceeding could not overcome these objections, and that consequently the proposed acquisition and transfer were in all respects adverse to the public interest. Member Jones reasoned that it would not be consistent with the public interest to change radically the route pattern across the North Atlantic by eliminating one of the American-flag carriers on the basis of this record, and, since the Board in 1952 would be required to re-examine fully the entire picture on the basis of the seven year experiment it originally ordered, the transfer and acquisition should be disapproved. Member Lee concluded that the proposal was inconsistent with the public interest, but believed that if TWA were given London these objections would be overcome. Member Ryan concluded that the proposal was in the public interest and should be approved.

On June 1, 1950 the Civil Aeronautics Board transmitted its opinion and orders to the President for his approval. This approval was originally given and the orders were signed by the President and returned to the Board late in

the afternoon of June 29, 1950. These orders were recalled for reasons never officially disclosed by the President's office on the morning of June 30, 1950 before the Board had issued or made public its opinion and the orders as originally approved. (P. 7; PR. 33; R. 7, 139)

The President subsequently on July 10, 1950, instructed the Board to issue an order approving the transfer conditioned upon allowing PAA to serve Paris and Rome, and allowing TWA to serve London and Frankfurt. (R. 147) At the same time the original order disapproving the acquisition was returned to the Board, the President's original signature having been eradicated from it. (R. 7)

That same day a Board meeting was held and a majority of a quorum of the Board voted to issue an order pursuant to the President's directive. (PR. 33; R. 139) An order to that effect, containing certain incidental provisions relating to employee protective conditions among other things, not embraced in the President's directive, was prepared the following day, July 11, 1950. (PR. 33; R. 139) No Board meeting was subsequently held approving this order. It was, however, initialed by the individual members (PR. 33; R. 139) of the Board and transmitted, together with a revised opinion of the Board, to the President on July 11, 1950. It was returned to the Board on the same day with the approval of the President. (P. 8; R. 8)

Neither the opinion of the Board (R. 142-153) nor the order of the Board signed by the President on July 11, 1950, (R. 153-5) contains findings to the effect that the transfer of AOA's certificate is consistent with the public interest or that the amendments to the certificates of PAA and TWA are in the public interest. The Board's opinion does, however, contain a finding that, given the transfer of the certificate, the acquisition by PAA of the assets of AOA is in the public interest. (R. 149)

On July 21, 1950, petitioners and TWA severally filed petitions to review the orders of the Board in the United States Court of Appeals for the Second Circuit, moving that Court for a stay of the order of the Board pending final determination of the cause. Petitioners' petition, as distinguished by TWA's petition, named only the Civil Aeronautics Board as respondent. The two cases were not consolidated but oral argument was held on both before Judges Swan, Clark and Frank in New Haven on July 26, 1950. PAA and AOA (including its parent, American Airlines) were granted, without objection, the right to intervene in petitioners' cause. (R. 92, 93) At the oral argument on the motion to stay, PAA and AOA moved to dismiss petitioners' proceeding on the ground that petitioners had no standing to prosecute the cause and on the ground that the court pursuant to the case of *Chicago & Southern Airlines* v. *Waterman S.S. Co.*, 333 U. S. 103 (1948) was without jurisdiction to review the Board's order. (R. 88, 91-2) No such motion was filed by PAA and AOA in the TWA proceeding, nor was any such motion filed by the respondent, Civil Aeronautics Board in either cause, although it was stated orally that the Board intended thereafter to file such a motion.

On August 14, 1950, the Court of Appeals rendered its decision dismissing both petitions for want of jurisdiction. (R. 93-102) On August 29, 1950, petitioners pursuant to the rules of that Court filed a petition for rehearing contending that, not only had the Court been in error in holding that the original decision and order of the Board disapproving the acquisition was subject under Section 801 of the Civil Aeronautics Act to the approval of the President, but that due to a misunderstanding of the representative status of the petitioners, occasioned by a false affidavit and a false statement filed respectively by counsel for PAA and AOA,

the Court erroneously failed to consider points material to the determination of the cause raised in these proceedings by petitioners, as distinguished from TWA,—points that petitioners were entitled to raise pursuant to *Federal Communications Commission* v. *Sanders Bros.*, 309 U. S. 470 (1940), and *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U. S. 4 (1942). On September 6, 1950, the Court of Appeals denied this petition for rehearing *per curiam*. (R. 141) Certiorari is now being sought from these decisions of the Court of Appeals.

Specification of Errors to Be Urged

The Court of Appeals of the Second Circuit erred:

1. In holding that the denial by the Civil Aeronautics Board of an application for the transfer of a certificate of public convenience and necessity in international air transportation required the approval of the President of the United States contrary to the provisions of Section 801 of the Civil Aeronautics Act.

2. In not considering petitioners' contention that the directive given in this cause by the President, if he had authority in the cause, extended to requiring the Civil Aeronautics Board to determine a matter not in issue in the proceeding, namely, the granting of new routes and services to PAA as a condition of the approval of its application for the transfer of the certificate of AOA to PAA.

3. In not considering petitioners' contention that the order in question of July 10, 1950, alleged to have been adopted by the Civil Aeronautics Board was never in fact adopted by the Board acting as a Board.

4. With regard to 2 and 3 above, in not deciding the contentions thus advanced by petitioners, presumably on the basis that petitioners had no standing to raise these issues,

contrary to the earlier decisions of that Court and the Supreme Court of the United States.

5. In holding that since the transfer of the certificate from AOA to PAA required the approval of the President of the United States, his approval was also required for the acquisition by PAA of the assets of AOA, contrary to the provisions of Section 801 of the Civil Aeronautics Act.

Reasons for Granting the Writ

I

The Court of Appeals in holding that Presidential approval under Section 801 of the Civil Aeronautics Act extended to the deni by the Civil Aeronautics Board of an application for the transfer of a certificate in international air transportation "decided an important question of federal law which has not been, but should be, settled by this Court". (Rule 38, para. 5 (b) of the Rules of the Supreme Court.)

There is no issue but that this question has never before been determined by the Supreme Court. The only issue thus is as to its importance and whether the decision of the Court of Appeals is so plainly right as not to warrant review by this Court.

1. *The Importance of the Question:*

The significance of the question at issue seems fully to have been recognized by the lower Court. Although the hearing before that Court was on the question of a stay, it determined to dismiss the cause for want of jurisdiction, saying that "an immediate decision on this issue may accelerate the parties' access to the Supreme Court, if they are disposed to seek it". (R. 101) With regard to this case alone the resolution of this question in the manner in which the Court of Appeals has resolved it, has meant that con-

trary to the considered opinion of a majority of the Civil Aeronautics Board, rendered after extensive hearings and argument, the President has required that Board to eliminate one trans-Atlantic air carrier and to create a route pattern for international air carrier operations across the North Atlantic far different from the pattern originally established by that Board in 1945, and thereafter consistently adhered to by it. The President upon his own initiative and without notice or hearing thus set at naught the findings of the majority of that Board that the proposed transfer was not in the public interest.

Apart from the great public importance of this case, which may well fasten upon American aviation a pattern of competitive unbalance and monopoly in international air transportation that it may take decades to remove, further mergers and acquisitions in this field of air transportation are more than likely. With regard to this "merger" and those to come, the fundamental issue raised is whether the route patterns of the future will be dictated in camera by the President of the United States or determined by an allegedly independent Civil Aeronautics Board, subject only to such limited approval by the President as a correct and fair reading of Section 801 of the Civil Aeronautics Act requires. In the field of international air transportation—probably the most important and vital field of future transportation of all kinds—it is highly important that the areas of action by the President and by the Civil Aeronautics Board be delineated by the high authority of this Court in the manner in which the statutes and the Constitution of the United States require.

Furthermore, the question involved is a vital one in the general field of administrative law. Admittedly the *Waterman Case, supra,* is authority for the fact that Congress can confer on the President an unreviewable and ultimate

power to decide certain issues relating to international air transportation which involve broad and delicate issues of foreign policy—matters traditionally within the responsibility of the Executive. But in this case the statute literally construed gives the President no such power, and, since the Board declined to approve the transfer, no delicate issues of foreign policy are presented to call for vesting in the President an authority not required for the efficient exercise of his high office. Consequently to remove the decision of the question from all judicial scrutiny is required neither by the statute nor by the basic philosophy of the *Waterman Case* and violates basic conceptions of the rule of law.

2. *The Correctness of the Lower Court's Decision:* The decision of the lower court admittedly departs from the literal grammatical construction of Section 801 of the Civil Aeronautics Act. The justification for doing so, according to the lower Court rests on four grounds: (a) That "the meticulously literal reading" of the statute contended for by petitioners "is negated by the broad sweep of the doctrine in the Waterman Case" (R. 99-100); (b) that since denials of amendments raise issues of delicate foreign policy calling for Presidential approval of action, denials of transfers should be subjected to the same requirement of Presidential review (R. 100); (c) that the language of the second sentence of Section 801 leads to the conclusion that Presidential review is required of denials of transfers as well as the approval of such transfers by the Board (R. 100); and (d) that, inasmuch as the present proceeding had been broadened by the Board to include a possible revision of routes, whatever the general rule might be, a denial of a transfer in this case was subject to Presidential review. (R. 100)

With regard to the first contention of the lower Court, namely, that the "broad sweep" of the *Waterman Case*

calls for the liberal construction that Court indulged in, two things are to be observed. The first is that the *Waterman Case* does not deal with this issue. The *Waterman Case* related only to the judicial reviewability of Presidential action in a situation where he was admittedly given the power to review Board action. There is certainly nothing in the *Waterman Case* which calls for the conclusion that decisions of the Board in international air transportation having no diplomatic repercussions must in the absence of an express statutory requirement be subjected to Presidential review, simply because they do relate to the field of international air transportation. It could, indeed, be urged that Board action which requires further diplomatic implementation, even in the absence of express statutory requirement, under the *ratio decidendi* of the Waterman doctrine would have to be submitted to the President for approval. But a denial of a transfer, as the lower Court wholly failed to recognize, calls for no subsequent diplomatic implementation.

In the second place, the lower Court appears to have assumed that the *Waterman Case* established the President as the chief architect of the international air route pattern, with authority and responsibility extending to every major facet of international air transportation. Although it was pointed out to the lower Court both on brief and in argument (PR. 27; R. 138) that such a concept is far from true, the lower Court totally ignored this contention. Had its premises as to the respective roles of the President and the Board been rooted in the hard facts of administrative practice, it could hardly have dismissed petitioners' contentions as a mere plea for a "meticulously literal reading" of the statute. Petitioners repeatedly pointed out that Presidential review does not extend to a multitude of matters vitally

affecting international air operations. In this host of matters, so essential to the efficient conduct of our international air transport system, the Board has the sole responsibility. These matters include among others exemptions under which American-flag carriers today are conducting a multitude of international operations, both scheduled and non-scheduled;[1] they include temporary suspension of services in international air transportation,[2] pooling agreements among American carriers one of whom is engaged in international, overseas or territorial transportation,[3] acquisitions by American carriers of the control of other American carriers engaged in international air transportation [4] or of foreign air carriers,[5] important interchange agreements in international air transportation,[6] air

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[1] *Scheduled Service:* First and Second North Atlantic Route Amendment Cases, 7 C.A.B. 133, 455 (1946); PAA between Boston and Bermuda, Ser. No. E. 447 (April, 1947); PAA to Camaguey, Cuba, Ser. No. E-199 (Dec., 1946); PAA to Curacao, Ser. No. E-180 (Dec., 1946). *Unscheduled Service:* PAA to Alaska, Ser. No. 4368 (June 28, 1950). Letters of registration authorizing carriers to engage in irregular or unscheduled international air transportation are also issued without the approval of the President.

[2] See C.A.B. Ser. No. E-470 (April 27, 1947), suspending PAA service to New Caledonia; Ser. No. E-568 (May 23, 1947) suspending PAA service to Barreiras, Brazil; Ser. No. E-490 (May 1, 1947) suspending PAA service between Fairbanks and Bethel, Alaska. See also Ser. E-902 (October, 1947) revoking an earlier suspension of PAA service between San Francisco and Honolulu.

[3] Pan American-Matson-Inter-Island Control, 3 C.A.B. 540 (1942); Pan American-U.S. Lines Agreement, 8 C.A.B. 609 (1941); Alaska Coastal Airlines et al., Juneau Mail Routes, 8 C.A.B. 127 (1947).

[4] American Airlines, Control of American Export Airlines, 6 C.A.B. 371 (1945); National-Caribbean Atlantic Control Case, 6 C.A.B. 671 (1946).

[5] Pan American, Acquisition of China National, 6 C.A.B. 143 (1944); United Air Lines, Acquisition of Lamsa, 4 C.A.B. 409 (1943); Braniff Airways, Acquisition of Aerovias Braniff, 6 C.A.B. 947 (1946).

[6] Pan American-Panagra Agreement, 8 C.A.B. 50, 65 (1947).

mail rates in such commerce, and a host of other matters.[7] Indeed, in the very case of the denial of the transfer of a certificate to engage in international, overseas or territorial transportation—the types of transportation covered by Section 801—the Board's practice prior to the present proceeding was not to refer the matter to the President. *Acquisition of Cordova Air Service by Alaskan Airlines*, 4 C. A. B. 708 (1944). As counsel for the Board themselves have said *arguendo* in *Pan American-Grace Airways, Inc.* v. *Civil Aeronautics Board*, 178 F. (2d) 34 (1949):

> "The Board exercises many powers 'in respect of' a certificate for foreign air transportation which are not subject to approval by the President.
>
> "It is the Board alone that determines the mail rates that shall be paid to carriers operating routes in foreign air transportation notwithstanding the fact that but for substantial government subsidy in the form of mail pay granted to such operators, few of the routes found to be necessary by the President could have been developed or maintained (Section 406). It is the Board acting independently that approves or disapproves consolidations, mergers, or acquisitions of control affecting such carriers and routes (Section 408) and approves agreements between such carriers relating to such matters as pooling, the establishing of rates, the regulating and preventing of competition and other cooperative working arrangements (Section 412). It is the Board acting alone that issues orders pursuant to section 416 (b) exempting such carriers from the provisions of the Act so as to authorize the holder of a certificate to conduct services, frequently of major importance, not authorized by the certificate. It is the Board acting alone that issues orders pursuant to sec-

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[7] *Cf.* Pacific Northwest-Hawaii Case, 8 C.A.B. 149 (1947) (denial of exemption to serve Seattle-Hawaii); Pan American-Grace Airways, Inc. *v.* Civil Aeronautics Board, 178 F. (2d) 34 (D.C.C.A. 1949) (denial of a petition to amend or suspend a competitor's international service).

tion 401 (k) authorizing a carrier to suspend service to foreign or domestic points named in its certificate of public convenience and necessity. It is the Board acting alone which approves nonstop service between points named in a certificate of public convenience and necessity authorizing foreign air transportation, thereby providing for a direct nonstop service which does not stop at each point named in the certificate. (Section 401 (f); Economic Regulations Section 238.4). All of these actions have been taken time after time in numerous cases, and Panagra has been the beneficiary of orders of this kind in proportion to its size and the scope of its operations.

"And even in those proceedings where the final decision of the Board is subject, pursuant to section 801, to approval of the President the Board exercises important functions in which Presidential approval plays no part. The Board alone determines the order in which applications proposing foreign air transportation shall be heard. It determines whether several of such applications will be consolidated for hearing in a single proceeding; it determines all intermediate procedural matters and, where applicants so request, it dismisses applications for certificates in foreign air transportation without submitting such matters to the President.

"When section 801 is viewed in the light of the roles of the President and the Board in their respective zones of authority, it becomes apparent that Congress did not intend to vest in the President blanket powers over all Board action affecting foreign air transportation, but only to grant to him important—and final—authority in a restricted field." (Brief, Pp. 40-42)

Running through these situations where no Presidential review is required is the central fact that Board action of the types there mentioned involves no serious issues of foreign policy and requires no further diplomatic implementation. This is also true of the denial of the transfer of a certificate. The approval of such a transfer, however,

does raise serious diplomatic problems and the statute rightly makes this subject to Presidential approval. If a transfer is approved, new permits must be gotten by the acquiring carrier from foreign governments and the applications for these permits, to say nothing of their issuance, calls for the intervention and help of the State Department. Whether or not the Executive should be obliged to act in behalf of an American carrier to secure such permits raises serious diplomatic issues. Naturally the question as to whether the State Department should assume such a burden is for the President and not the Board to decide. But a denial of a transfer raises no faintly comparable issue. A denial requires no further diplomatic implementation of any kind, so that no reason of policy exists for requiring Presidential approval of Board action denying the transfer of a certificate.

The denial of a transfer of a certificate is far different from Board action denying the issuance of an original certificate, which is expressly made subject to Presidential review. The latter raises a basic question as to whether American-flag service should be extended for reasons relating to commerce and the national defense to some new foreign area. With such an issue the Executive has an obvious concern. But a denial of a transfer never raises any issue as to a new service, since the services have already been certificated; it raises merely the operational question as to whether a service theretofore rendered by two American-flag carriers should now be conducted by one.

The lower Court did not argue that denials of transfers should be subject to Presidential approval because denials of original certificates were so subject; but it did argue that denials of transfers should be Presidentially approved since denials of amendments of certificates—also not expressly made subject to Presidential approval by the

Statute—should be subject to Presidential review since these latter denials involved delicate issues of foreign policy. In doing so, however, the lower Court mistook completely the meaning of "amendments" as employed by the Statute. Since for technical reasons, as petitioners pointed out (PR. 22-3; R. 128-9), applications for new certificates are frequently cast by applicants in the form of an amendment to an old certificate,[8] these "amendments" do raise the type of policy considerations adverted to by the lower Court. But the term "amendment" as used in the Statute both historically and as a matter of common sense has a greatly restricted meaning (PR. 23-4; R. 129-130). Construed in the light of history and in the light of the normal meaning of that term, the denial of an amendment raises no such issues of delicate foreign policy as the lower Court envisaged.[9] Indeed, the lower Court permitted a

[8] The reason that carriers apply for new routes in the form of amendments to existing routes is to avoid so-called terminal points since these cannot be overflown under the existing regulations of the Board. Thus if a carrier has a route from A to B with C designated as an intermediate point, and it wishes to apply to fly from C to D, it would do so by seeking an amendment to its A-C route. This will enable it, if it so chooses, to fly from A to D non-stopping C. If it had only a new route from C to D it could not nonstop C on flights between A and D, since C is a terminal point on the C-D route. Pan American, for example, applied for and was granted a 2400 mile route from Honolulu to Portland and Seattle in terms of an amendment of its certificate to operate from San Francisco and Los Angeles to Honolulu, Tokyo, Shanghai and other Far Eastern points. *In the Matter of Matson Navigation Co.*, 9 C.A.B. 580 (1948). In argument in the instant case counsel for Pan American claimed *Continental Air Lines, Inc., Texas Air Service*, 4 C.A.B. 478 (1943) was authority for requiring a denial of an application for an amendment to be submitted to the President for his approval. Although in that case the application was cast in the form of an amendment and its denial was submitted to the President for his approval, what was actually applied for was a new route linking San Antonio in Texas for the first time with the Mexican city of Monterey. As such it was obviously proper to submit the Board action to the President for his approval.

[9] Typical of such a case would be the denial of an amendment authorizing service to a point in a country already being overflown by the carrier, such as Bristol, England, on the Shannon-London route.

form of practice, followed by applicant air carriers for totally different reasons, to control its substantive interpretation of language in the Statute which has a different historic meaning.

The third contention of the lower Court rests upon an interpretation of the second sentence of Section 801 of the Act. This requires copies of all applications "in respect of such certificates" to be transmitted to the President at the time they are filed with the Board, and "all decisions thereon" by the Board to be submitted to the President before publication. This sentence, the lower Court insists, would be meaningless unless both denials and approvals were to be subject to Presidential approval. Obviously, since at the time of filing it is impossible to know whether an application will be denied or approved, the transmission of all applications to the President becomes essential. The phrase relating to "all decisions thereon" has also an obvious reference to the first sentence, meaning all decisons that by the first sentence are subject to Presidential approval. Were the Court's interpretation of the second sentence correct, the language of the first sentence expressly making Board denials of new certificates as well as decisions involving such certificates subject to Presidential approval would be mere surplusage.

The Court's final contention, namely that since the case involved the possibility of new routes being certificated as well as the transfer of AOA's certificate to PAA and that therefore this case should have been submitted to the President for approval, whatever the general rule may be, clearly misconceives the entire proceeding before the Board. As the Board stated again and again in its orders dealing with the scope of the proceeding, if the transfer was to be denied no new routes were to be certificated. That fact makes meaningless this portion of the lower Court's argument.

It is to be observed that, if the Board's order of May 17, 1950, was not subject to Presidential approval by virtue of the Statute,[10] that order is today an effective order. If the Board's action in voluntarily making that order subject to Presidential approval be deemed valid, that approval was given. Even though it may be admitted that the President in cases where he acts in a quasi-judicial manner has the power to recall an approval once given prior to publication, such a doctrine has no place in instances where the President acts in a different capacity, such as in an executive or ministerial capacity. In such instances, as this Court long ago recognized, action once taken is final and irrevocable. *Marbury* v. *Madison*, 1 Cranch 137 (1803); *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 (1899).

II

In not considering petitioners' contention that the President, if he had authority in the cause, acted beyond the scope of the proceeding in granting a new route to PAA, the lower Court departed "so far from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision", as well as by so doing it reached a conclusion in conflict with the decision of the Court of Appeals of the District of Columbia on the same matter. (Rule 38 (5) (b)).

It cannot be denied that in giving PAA entry into Paris and Rome, PAA was awarded a series of new routes. Under its certificate as amended at the President's direction PAA is authorized to fly from Shannon or London to Paris, Frankfurt to Paris or Rome, Marseilles to Rome, as well as

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[10] Counsel has heretofore stated that under these circumstances the conditions attached to the Board's order for Presidential approval were invalid. They still think so but for the purposes of this petition the agreement is not essential.

a series of other routings. All of the above routes, with the exception of Shannon-Paris had never before been certificated to or flown by any American-flag carrier. The Shannon-Paris route was then being flown by TWA, but the award to PAA was not the transfer to it of TWA's route but the creation of a new route.

Petitioners contended in brief and argument before the lower Court, as well as on petition on re-argument, that no new routes were at issue in this proceeding and that, if they were, PAA had never truly put in issue these routes. The lower Court ignored petitioners' contentions.

It certainly cannot be true that in a proceeding, which we will assume is subject to Presidential approval, the President can order the Board to make awards beyond the scope of the proceeding itself. If an applicant applies for a route from A to B, neither the Board nor the President can award him a route from X to Y. Such action, certainly never sanctioned by the *Waterman Case,* would go beyond the very requirements of due process. *Morgan* v. *United States,* 298 U. S. 468 (1936).

As petitioners expressly pointed out, the Board in its clarifying order (Ser. No. E-2833) as to the scope of the proceeding said of its earlier order:

> "Nor did we intend to determine in the 401 (h) proceeding whether new services were required in the area covered by the certificates of the transatlantic carriers." (R. 162)

And again in the same order the Board once more said:

> "As indicated above, in instituting the 401 (h) proceeding we did not intend to pass upon the question whether new or different services were needed in the area under consideration, and we are not presently concerned with that question." (R. 163)

The Court of Appeals of the District of Columbia took the Board at its word. Seaboard & Western Airlines, a party to the *Transfer Case* before the Board, had a prior application pending before the Board requesting authority for an all cargo operation from American to European points. Fearing that that application would be prejudiced by the *Transfer Case*, it requested that its proceeding be consolidated into the *Transfer Case*. The Board denied this request. On appeal to the Court of Appeals of the District of Columbia that decision of the Board was affirmed but on the express representation of the Board that the *Transfer Case* did not involve the grant of new routes and new services. *Seaboard & Western Airlines* v. *Civil Aeronautics Board*, 181 F. (2nd) 777 (1949). That Court in this respect said at p. 780 of its opinion:

> "The Board's position appears to be neither unreal nor unreasonable. It does not seem to us that in reallocating, because of a merger, *existing routes between existing carriers* it need enter upon consideration of the whole problem of North Atlantic routes and carriers, and we think we must rely upon the Board's declarations, formally entered in its orders and declared to us in its briefs, in respect to the scope of the proceeding which it has instituted. Seaboard has been permitted to intervene in the proceeding and thus has full opportunity to know what is being done in it. If that proceeding should go beyond, or tend to go beyond, the issues as limited by the Board's declarations, Seaboard will have opportunity to protect whatever rights it has in respect of its application. As we have said, it has no initial right to have the area case reopened; its right is to have its application considered in any proceeding in which general consideration of the area is reopened." (Italics supplied)

Moreover, the question as to these new routes given by the President to PAA was never truly put in issue by PAA.

It is unnecessary here to deal with the manner in which the issue of these routes was raised as a purely defensive measure by PAA. That matter is fully set forth in pages 8 to 18 of Petitioners' Motion for Reconsideration and Rehearing and the Court is respectfully referred to those portions of the record. (R. 114-124) As evidentiary of this fact, it is worth noting that PAA at the time of this Proceeding had on file with the Board an application to serve Paris and Rome, the very routes granted it in this proceeding. (C.A.B. Docket No. 2986). But at no time did PAA ever move to consolidate that application into the *Transfer Case*.

In this respect, this case differs wholly from *Chicago and Southern Air Lines* v. *Civil Aeronautics Board*, where this Court recently denied a writ of certiorari. (71 Sup. Ct. 66 (1950)) In that case the Board had made no finding as to the fitness, willingness and ability of an applicant air carrier because it denied the application on the ground that the route applied for was not required by the public interest. Later at the President's direction it granted the certificate applied for, still making no finding on the issue as to the fitness, willingness and ability of the applicant air carrier. This issue, however, was admittedly raised in the proceedings before the Board. Here the President's "findings" and order went beyond the scope of the proceedings before the Board and decided a matter—new routes for PAA—expressly excluded by the order of the Board itself from consideration in the proceeding.

III

In not considering the petitioners' contention that the Board's order of July 10, 1950, was never adopted the lower Court departed "so far from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." (Rule 38 (5) (b)).

The order of July 10, 1950—the second order of the Board which the lower Court held to be valid—was never adopted by the Board. It was never even in existence on that date and was only completed the following day. After completion it was never adopted at any meeting of the Board but only initialled separately by each member of the Board, prior to its submission on July 11, 1950 to the President for his approval. Subsequent to the President's approval, the order was published without further action by the Board. The only Board action ever "approving" the order alleged to have been approved on July 10 was a meeting of the Board held that day authorizing the drafting of an order generally along the lines of that initialled by the individual members the following day.

The action taken by the Board on July 10, 1950 is clearly not the equivalent of the approval of an order or the adoption by the Board of an order. It was merely a directive for the preparation of an order whose details were still unsettled. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U. S. 667 (1950).

Individual initialling by the Board members of an order does not constitute Board action, which is essential for the adoption of an order. This is the settled requirement in other comparable fields. The reason for this rule was well stated in *Cammeyer* v. *Lutheran Churches*, 2 Sandf. Ch. 208,

229 (1844), and was quoted in *Kansas City Hay-Press Co.* v. *Devol,* 72 Fed. 717, 722 (W.D. Mo., 1896):

> "The directors in the bank, and the trustees, in this case, are, by the charter, the select class or body which is to exercise the corporate functions. In order to exercise them, they must meet as a board, so that they may hear each other's views, deliberate, and then decide. Their separate action, individually, without consultation, although a majority in number should agree upon a certain act, would not be the act of the constituted body of men clothed with the corporate powers."

Numerous authorities support this proposition. *Schuckman* v. *Rubinstein,* 164 F. (2d) 953 (C.C.A. 6, 1947); *Clavelle* v. *Washington Trust Co.,* 226 Fed. 400 (C.C.A. 9, 1915); *Lee County* v. *James,* 178 Miss. 554, 174 So. 76 (1937); *Stanley* v. *Board of Appeals,* 5 N.Y.S. (2d) 956, 168 Misc. 797 (1938).

IV

The lower Court's failure to consider issues raised by petitioners with regard to points three and four is clearly due to its having regarded petitioners as having no standing before it to raise these issues and, as such, the lower Court "has decided a federal question in a way probably in conflict with applicable decisions of this Court" as well as the lower Court itself. (Rule 38 (5) (b)).

There is no question but that the lower Court failed to consider the contentions advanced by petitioners contained in two and three above. It is also clear, moreover, from a reading of the lower Court's opinion that it considered none of the contentions advanced by petitioners. This is disclosed by two facts. The first is that the lower Court did not consider any contentions advanced by petitioners, which were not raised by TWA. The second is that in deal-

ing with petitioners' contentions that were also advanced by TWA, and which petitioners had buttressed by argument of a character dissimilar to that of TWA and supported by other authorities, the lower Court in deciding on these contentions adverts neither to petitioners' arguments nor cites a single authority cited by petitioners but not cited by TWA.

This action of the lower Court seems to have been due to its misapprehension of who petitioners were and a consequent implicit conclusion that petitioners had no standing before it. True, the lower Court did not rule on the motions to dismiss petitioners' petition for review for want of a substantial interest inasmuch as the entire cause was dismissed for want of jurisdiction, but as a matter of fact it dealt with petitioners exactly as if it had granted those motions.

Such action was error. How the lower Court fell into this error is apparent. Petitioners were originally granted the right by the Board to intervene as parties in the *Transfer Case* in a representative capacity, as representing more than two hundred employees of AOA who had a substantial interest in the outcome of the cause,—an interest that extended beyond mere so-called employee protective conditions to the essential question of whether the transfer of AOA's certificate to PAA was in the public interest. Later petitioners also established the fact that certain of the employees they represented were stockholders of AOA. They actively participated in the case emphasizing particularly that the transfer in their opinion was not in the public interest. In the hearings before the trial examiner they sustained successfully the fact that they were acting in a representative capacity—a fact that was not challenged thereafter before the Board by PAA or AOA. (Pr. 3-5; R. 109-111). They set forth this fact of their representative

capacity in their petition for review to the lower Court and supported that fact by sworn statements. (P. 1; R. 20)

Unfortunately misleading statements to the contrary were made to the lower Court by counsel for AOA (R. 108, 109) and in an affidavit by counsel for PAA (A. 25; R. 48). On the basis of these statements these two counsel moved to dismiss petitioners' proceeding for lack of a substantial interest (R. 88, 91-2). No such allegations were made by counsel for the Board nor was any similar motion made by him, although it was argued by counsel for the Board (wrongly in petitioners' opinion) that petitioners' interest extended only to the employee protective conditions. That the lower Court accepted as true the erroneous allegations [11] of counsel for AOA and PAA seems apparent from the statement in its opinion that "Brian O. Sparks and six other employees of Overseas are the petitioners." (R. 94) This erroneous conclusion of fact—a conclusion that could not have been made on the moving papers alone and one that is contradicted by the record itself—undoubtedly led to the lower Court's ignoring all petitioners' contentions.

That petitioners did have a substantial interest is not open to doubt. Taken at its narrowest, it extended to the matter of their protection as employees, *United States* v. *Lowden,* 308 U. S. 225 (1939), and once such an interest is established, under the authority of this Court as well as the lower Court, petitioners' right of review extends to every relevant issue in the case, particularly those relating to the public interest. *Federal Communications Commission* v. *Sanders Bros.,* 309 U. S. 470 (1940); *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U. S. 4 (1942); *Associated Industries* v. *Ickes,* 134 F. (2d) 694 (C.C.A. 2, 1943). This principle of law is too clearly estab-

[11] The proof as to the falsity of this affidavit and the statement referred to, is set forth in the Petition for Rehearing, pp. 2-5. (R. 108-111)

lished by these cases to require argument or elaboration. True, these cases dealt with statutes giving "parties aggrieved" the right to appeal from an administrative order and to raise the issue of public interest there presented, whereas the Civil Aeronautics Act, Section 1006 (a), 49 U.S.C. 646 (a), confers this language on parties possessing a "substantial interest". The meaning of the two statutes is the same, however, for surely parties who have a "substantial interest" are those parties who are "aggrieved" by adverse administrative action.

Petitioners also were minority stockholders of AOA. Both as employees and as stockholders their interests were likely to be affected adversely in a pecuniary way more seriously by the contemplated transfer than a competitor such as TWA. To toss them out of the case, as the lower Court in essence did, was a grave error in the application of settled federal law.

V

The lower Court wrongly decided an important question of federal law, as yet undecided by this Court, when it held that the requirement for Presidential approval in this cause extended not only to the transfer of the certificate but to the acquisition of the assets of AOA by PAA. (Rule 38 (5) (1))

This conclusion of the lower Court is at variance with the Statute, the action of the Civil Aeronautics Board, and seems contrary to the lower Court's own previous holding in *Pan American Airways Co.* v. *Civil Aeronautics Board*, 121 F. (2d) 801 (1941).

The Statute in terms rightly does not call for Presidential approval of the acquisition of the assets of one international air carrier by another. The reason for this is plain, inasmuch as these issues raise complicated questions of the

fair treatment of minority stockholders, and the appropriateness and fairness of the purchase price—questions for quasi-judicial determination and wholly undesirable for determination by unreviewable Presidential action.

The Board itself recognized this fact, for, although it made no findings of fact relating to the public interest underlying the transfer of the certificate, since in this matter it rested on the President's directive, it expressly found pursuant to Section 408 of the Civil Aeronautics Act that, given the transfer of the certificate, the acquisition of AOA's assets by PAA "is consistent with the public interest and will not result in the creation of a monopoly and thereby restrain competition or jeopardize another carrier not a party to the acquisition" (R. 149). The Board obviously made this finding because it deemed it essential to the validity of that portion of its order approving the acquisition of the assets as distinguished from the transfer of the certificate.

The lower Court's conclusion also seems contrary to its earlier decision in *Pan American Airways Co.* v. *Civil Aeronautics Board, supra.* In that case an order of the Board, approved by the President, authorized the issuance of a certificate to American Export Air Lines, Inc., and authorized American Export Lines to acquire the control of the latter. The order was an entirety and approved as such by the President. *American Export Airlines, Inc.*, 2 C. A. B. 16, 52-3 (1940). On review in Second Circuit Court of Appeals, it was held that the issuance of the certificate was not reviewable but that the question of the acquisition of control was reviewable. That case was never adverted to in this connection by the lower Court. It can be distinguished from the instant case in that the issue in that case related to the acquisition of control rather than of assets, but the grounds for distinction are certainly not substantial.

Extending the purview of Section 801 far beyond its language is justifiable neither by the *Waterman Case* nor by considerations of policy, for the issues involved in an acquisition of assets are clearly not of the type appropriate for unreviewable Executive determination. The correction of that error by the lower Court, it is submitted, is desirable in the light of the significance of this problem to the aviation industry as a whole.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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